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IN THE

Supreme Court of the United States

October Term, 1968
No. 1268

MAURICE H. KOWAN, *Appellant,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

ROGER ARNEBERGH,
City Attorney,
PHILIP E. GREY,
Assistant City Attorney,
MICHAEL T. SAUER,
Deputy City Attorney,
205 South Broadway,
Suite 500,
Los Angeles, Calif. 90012,
(213) MA 4-5211, Ext. 1483,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

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IN THE

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October Term, 1968
No. 1268

MAURICE H. KOWAN, *Appellant,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered November 18, 1968, be affirmed and/or that the appeal taken therefrom to this Court be dismissed on the ground that the said judgment appealed from rests upon an adequate non-federal basis.

Statement.

This is a direct appeal from a judgment entered November 18, 1968 by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Appellant was charged in a verified twelve count misdemeanor complaint, filed in the Municipal Court of the Los Angeles Judicial District.

The appellant was charged with four counts of violating California Health and Safety Code Section 1714 in that on May 17, 1966, May 23, 1966, May 24, 1966 and on June 2, 1966, he "did wilfully and unlawfully and falsely represent a substance and treatment as effective to arrest and cure cancer."

The appellant was charged with four counts of violating California Health and Safety Code Section 26286 in that on May 17, 1966, May 23, 1966, May 24, 1966, and on June 2, 1966, he "did wilfully and unlawfully disseminate a false advertisement of a drug, to wit: Beta-cyanogenetic glucosides including amygdalin (with or without the addition of diisopropyl ammonium iodide) and prunasin, commonly known as Laetriles."

The appellant was charged with four counts of violating California Penal Code Section 484 in that on May 17, 1966, May 23, 1966, May 24, 1966, and on June 2, 1966, he "did wilfully and unlawfully take away personal property of another, of a value not exceeding the sum of two hundred dollars, to wit: The personal property of Tobias Flores of the approximate value of" certain specified amounts.

On July 24, 1967, the appellant was adjudged guilty on all twelve counts by a jury. On September 15, 1967 sentence was imposed by the court.

An appeal was taken to the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles. Briefs were filed in

said appellate court and oral argument presented. The matters were submitted and thereafter on November 18, 1968 the judgment was affirmed in part and reversed in part in a written unpublished opinion (Jurisdictional Statement, Appendix "A"). A petition for Rehearing or Certification to the Court of Appeal was denied on December 5, 1968. Appellee's request for Modification of Opinion was denied on December 5, 1968.

On February 18, 1969 the appellant filed a Notice of Appeal to the United States Supreme Court in the Appellate Department of the Los Angeles Superior Court.[1]

I.

California Health and Safety Code Sections 1714 and 26286 Are Not a Violation of the First and Fourteenth Amendments.

The California Department of Public Health has determined that Laetrile is of no value in the diagnosis, treatment, alleviation or cure of cancer. . . . . The Department recommended that the public refrain from using Laetrile (Title 17, Chap. 5, Sub-Chap. 2, Article 2, Section 10400.1(b). California Administrative Code).

In Section 10400.1(c) the administration, sale or other distribution of Laetrile to any patient who has or believes that he has or may have cancer is prohibited.

Section 10400.1(d) provides that no person shall for the purpose of prescribing, administering, selling or otherwise distributing Laetrile make any representations

[1]This was the judgment of the highest court of the State in this proceeding since certification to the Court of Appeal was denied. (*Schmerber v. California* (1966) 384 U.S. 757, 16 L. Ed. 2d 908.)

that Laetrile has any value in arresting, alleviating or curing cancer. . . .

Metastasis is the medical term for cancer spreading through the body [R. T. p. 72]. The three primary treatments for cancer is by surgery, radiation and chemotherapy [R. T. p. 76]. A doctor treating cancer would normally give the patient a complete physical examination [R. T. p. 109], including a blood test [R. T. p. 114]. Tumors should be measured to determine if a patient is improving [R. T. p. 116].

Dr. Jesse L. Steinfeld had the opinion that the alleged anti-cancer effect of Laetrile was worthless. There has never been in his opinion a single verified report of even one cancer cure of Laetrile. There is no evidence that Laetrile has any value in even shrinking tumors, much less curing them [R. T. p. 149].

Steinfeld's opinion—based upon the academic, medical and scientific community opinion [R. T. p. 279], and on verbal discussions and writings [R. T. p. 281]—was that Laetrile is worthless [R. T. p. 287]. It has neither curative nor palliative value in the treatment of patients with cancer [R. T. p. 296]. The California Medical Association [R. T. p. 290], the California Advisory Cancer Council and the Department of Public Health, The Federal Food and Drug Administration [R. T. p. 290], the National Cancer Institute, the American Cancer Society [R. T. p. 291], and the deans of the medical schools at the University of Southern California, the University of California at Los Angeles, Stanford University, University of California, Loma Linda, and California College of Medicine [R. T. p. 290] have the opinion that Laetrile is without value. In Steinfeld's

opinion, no medical school teaches that Laetrile is of value in the treatment of cancer [R. T. p. 291].

Not one principal research center accepts Laetrile as having a curative or palliative effect on the treatment of cancer [R. T. p. 295].

Dr. Nathan Friedman conducted laboratory tests to determine whether Laetrile had any anti-tumor effect upon animals [R. T. p. 439]. The tests conducted between October 5 and November 10, 1952, led him to the conclusion that Laetrile had no anti-tumor effect on animals [R. T. p. 440]. The test results on the twelve mice revealed that the tumors that were untreated had grown unchecked just as the tumor that had been treated with Laetrile had grown unchecked [R. T. p. 443].

The Theory upon which Laetrile is based is that an enzyme breaks down the amygdalin. This releases cyanide gas that comes out and kills the cancer cell [R. T. p. 451].

Dr. Kenneth Ernst testified about a hearing on June 5, 1964, at the State Office Building in Los Angeles regarding the treatment of cancer by the appellant [R. T. p. 726]. At the hearing the appellant stated he would use surgery and radiation in all cases of early cancer [R. T. p. 735]. In Ernst's opinion, treatment with Laetrile would not be a doctor exercising his best judgment with a view to helping the patient [R. T. p. 747]. A doctor who never attempted to measure the progress of the disease would not be exercising his best judgment [R. T. p. 752]. Ernst testified that Laetrile had been tested by the American Medical Association in the 1950's, the Cancer Advisory Council in the 1960's [R. T. p. 755], by Dr. Paul Kirk, by Dr.

Friedman in the 1950's and by Dr. De Ome in the 1960's [R. T. p. 756].

The conclusion of the Calfornia Cancer Commission was that Laetrile had no effect on the tumors [R. T. p. 757]. Ernst had never heard of a single verified person whose tumor or cancer had been reduced at all by Laetrile [R. T. p. 762]. Ernst did not believe that the enzyme would break down the amygdalin [R. T. p. 805]. Laetrile had no value in any reported test [R. T. p. 872]. Laetrile had been tested in an effort to protect the public from a remedy which is of no value [R. T. p. 876]. It would not be good medical and scientific practice to give Laetrile to persons who are suffering from cancer [R. T. p. 877].

Dr. John Mehl conducted tests with Laetrile [R. T. p. 1010]. The experiments did not give any indication that beta-glucuronidase resulted in the release of cyanide from Laetrile [R. T. p. 1011]. The only time cyanide was released was when the Laetrile was boiled continuously for approximately three hours with 10 per cent hydrochloric acid [R. T. p. 1017]. Cyanide would kill any living organism [R. T. p. 1037].

Dr. Steinfeld repeatedly stated that it would be important for treatment that the doctor review all counts, X-ray, slides, all previous therapy as well as conducting a complete history and physical examination [R. T. p. 1104, p. 1117, p. 1168]. The diet of the patient, in Steinfeld's opinion, does not play an essential part in the treatment of cancer [R. T. p. 1148].

Dr. Brook testified that a bone marrow aspiration would be necessary to determine the type of leukemia [R. T. p. 1320]. In Brook's opinion a doctor who did

what the appellant did would not be engaged in research [R. T. p. 1404].

Tobias Flores was suffering from chronic granulocytic leukemia [R. T. p. 1362]. Leukemia is the abnormal, uncontrolled, overgrowth of the white cells [R. T. p. 1318]. Cancer is the name applied to a group of diseases in which there is unregulated growth, in which the cells no longer obey the normal body control mechanism, and proliferate and grow and spread without regard to what normally occurs, until ultimately the spreading, growing cancer cells kill the patient [R. T. p. 56].

Flores went to the appellant's office. The appellant was recommended by Dr. Hamilton, a chiropractor [R. T. p. 556]. Flores told the appellant that he had been diagnosed as having leukemia [R. T. p. 557]. The appellant did not ask Flores what sort of leukemia it was that had been diagnosed [R. T. p. 558]. The appellant told Flores he would treat him with Laetrile [R. T. p. 559]. The appellant made reference to an Osterizer he could sell Flores at a discount [R. T. p. 560]. On May 17, 1966, the appellant indicated that Flores would have to be treated daily with an injection of Laetrile followed the second week with an injection every other day and also to take vitamins and Enzymes [R. T. p. 561].

The appellant told Flores that he could not promise a cure for cancer, but that he was confident he could cure it within a year [R. T. p. 665]. The appellant specifically said, "Well, I can't cure or promise a cure, but I am confident that I can cure." [R. T. p. 666].

Flores received a treatment on May 17, 1966 [R. T. p. 561]. On May 23, 1966, Flores received an injection

of Laetrile [R. T. p. 563]. On May 24, 1966, Flores received an injection of Laetrile [R. T. p. 570]. On that day the appellant told Flores that Laetrile would kill the white cells [R. T. p. 570]. On June 2, 1966, Flores received an injection of Laetrile [R. T. p. 571].

On June 2, 1966, Flores asked the appellant if he could buy two vials of Laetrile that could be injected by his aunt [R. T. p. 573]. The appellant sold him two vials of Laetrile [R. T. p. 709, to p. 710]. These two vials were given by Flores to Alfred Di Dio [R. T. p. 1354]. The vials were analyzed and found to contain amygdalin [R. T. p. 1558].

Virginia Vicars, who accompanied Flores as his wife on May 17, 1966 [R. T. p. 902], on May 23, 1966 [R. T. p. 905] and on May 24, 1966 [R. T. p. 907] testified that the appellant stated it would take approximately one year to clear up the leukemia condition [R. T. p. 906]. The Laetrile injections were to clear up the leukemia [R. T. p. 907].

The appellant never gave Flores a physical examination during any of his four visits [R. T. p. 573]. Vicars testified that no physicals were given on the three dates she was in appellant's office [R. T. p. 908].

On May 17, Flores paid the appellant $6.00 [R. T. p. 561]. On May 23, Flores paid the appellant $30.00 [R. T. p. 569]. On May 24, Flores paid the appellant $20.00 [R. T. p. 571]. On June 2, Flores paid $9.00 [R. T. p. 572].

On May 23, prior to the injection, Flores signed a "release" which provided, in part, that Flores realized "that such treatment and surgery is experimental in nature and offer[s] no definite promise of cure or re-

lief." The "release" further provided "that Dr. Kowan makes no guarantees or promises towards the successful treatment of (his) cancerous condition." The document concluded that "Dr. Kowan and/or assistants, associates and consultants" were released "of any legal liability" [R. T. p. 643].

The appellant never asked for a history of Flores' case. He never requested Flores' records from the Veterans Administration Hospital [R. T. p. 696]. Dr. Brooks testified that he had never talked to or corresponded with the appellant [R. T. p. 1405].

Appellant argues that "this is a 'free speech' case if there ever was one!" In *Schenck v. United States,* (1919) 249 U.S. 47, 52, 63 L. Ed. 470, 473, this court recognized that "the most stringent protection of free speech would not protect a man in *falsely* shouting fire in a theatre. . . ." Appellee contends that under the guise of "free speech" the appellant may not *falsely* represent a substance and treatment as effective to arrest and cure cancer and disseminate a *false* advertisement of a drug.

The term "advertisement" relating to false advertising concerning drugs or devices includes oral representations. (*People v. Schmitt,* (1957) 155 Cal. App. 2d 87, 102, 317 P. 2d 673; *People v. Galway,* (1953) 120 Cal. App. 2d 45, 49, 260 P. 2d 212). Laws against false advertising are designed to protect the public who are not likely to know the facts. (*People v. Wahl,* (1940) 39 Cal. App. 2d Supp. 771, 774, 100 P. 2d 374).

In *People v. Phillips,* (1966) 64 Cal. 2d 574, 581, 51 Cal. Rptr. 225, the court made reference to Health and Safety Code Section 1714. "That section condemns as

a *misdemeanor* 'falsely to represent a device, substance or treatment as effective to arrest or cure cancer.' "

Appellee contends that appellant's "treatment" of Tobias Flores constituted a course of conduct which the State could prohibit because of the sufficiently important governmental interest of protecting the public against the disseminators of worthless drugs.

In *United States v. O'Brien,* (1968) 391 U.S. 367, 20 L. Ed. 2d 672, 679 this Court declared it "cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify the incidental limitations on First Amendment freedoms.

The Appellate Department stated that the crucial issue in this case was not the legality of Laetrile, but its effectiveness in the treatment of cancer. *"The evidence was not only substantial, but overwhelming, that Laetrile was ineffective in the treatment of cancer."*

The conviction of the appellant was not a violation of his right of free speech. Rather, appellant's conviction for his conduct in falsely representing a treatment to cure cancer and in disseminating a false advertisement regarding Laetrile was a proper exercise of the police power of the State of California in order to protect the general public from the false hopes presented to victims of cancer by disseminators of worthless drugs.

California Health and Safety Code Sections 1714 and 26286 are constitutional. They are neither vague

nor uncertain. Reasonable certainty is all that is required and a statute will be upheld if its terms may be made reasonably certain by reference to other definable sources. The complexities of the social problems dealt with by the California Legislature require that a practical construction be given to the language employed by the draftsmen of legislation lest their purposes be too easily nullified by overrefined inquiries into the meaning of words. (*People v. Weger,* (1967) 251 Cal. App. 2d 584, 590, 59 Cal. Rptr. 661; *People v. Agnello,* (1968) 259 Cal. App. 2d 785, 791, 66 Cal. Rptr. 511).

Health and Safety Code Sections 1714 and 26286 are narrowly drawn and limited to define and punish specific conduct lying within the domain of state power. (*People v. Davis,* (1968) 68 Cal. 2d 481, 487, 67 Cal. Rptr. 529.) The statutes are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. (*Cameron v. Johnson,* (1968) 390 U.S. 611, 20 L. Ed. 2d 182, 187). California Health and Safety Code Sections 1714 and 26286 are not an infringement of the First and Fourteenth Amendments.

II.

The Evidence Against Appellant Was Not the Result of an Illegal Search and Seizure.

Appellant appears to argue that his constitutional rights were violated in light of *Miranda v. Arizona,* (1966) 384 U.S. 456, 16 L. Ed. 2d 694 and *Katz v. United States,* (1967) 390 U.S. 347, 19 L. Ed. 2d 576. Appellee submits that the act of undercover agents going to the appellant's office did not constitute an infringement of the appellant's constitutional rights un-

der the First, Fourth, Fifth, Sixth or Fourteenth Amendments.

In *People v. Arnold,* (1967) 66 Cal. 2d 438, 448, 59 Cal. Rptr. 115, the court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way." Custodial interrogation also occurs when a person is led to believe, as a reasonable person, that he is deprived of his freedom in any significant way. (*People v. Butterfield,* (1968) 258 Cal. App. 2d 586, 590, 65 Cal. Rptr. 765).

There was no evidence that the appellate was in custody or deprived of his freedom in any significant way. Appellee contends that the "custodial interrogation" stage was not reached at the time Tobias Flores and Virginia Vicars visited the appellant's office. Even if such a stage had been reached, it certainly is doubtful whether Flores and Vicars are "authorities" within the meaning of *Miranda.* (See: *People v. Wright,* (1967) 249 Cal. App. 2d 692, 693, 57 Cal. Rptr. 781).

As "undercover agents" Flores and Vicars were not required to advise the appellant of his rights when they entered his office. In *People v. Putty,* (1967) 251 Cal. App. 2d 991, 997, 59 Cal. Rptr. 881, the court held that the *Dorado* doctrine (*People v. Dorado,* (1965) 62 Cal. 2d 338, 42 Cal. Rptr. 169) does not extend to statements made in the course of committing the crime itself. It, therefore, was not necessary for a police officer, posing as a prospective purchaser of stolen property, to

advise the suspect, prior to the negotiations for its sale, of his constitutional rights.

This Court has recognized the use of undercover agents (See: *Lewis v. United States,* (1966) 385 U.S. 206, 17 L. Ed. 2d 312, 316). The use of Tobias Flores and Virginia Vicars was not a denial of due process or equal protection of the law. These individuals were under no obligation to advise the appellant of his constitutional rights prior to the appellant offering to use Laetrile.

Katz v. United States, (1967) 390 U.S. 347, 19 L. Ed. 2d 576, and *Alderman v. United States,* (1969) 22 L. Ed. 2d 176 are not applicable to the instant case. It is important to remember that no tape recordings were ever offered in evidence. Only oral tetimony of what was said in Vicars' presence was presented to the jury.

Vicars accompanied Flores to the appellant's office on May 17, 1966 [R. T. p. 902], May 23, 1966 [R. T. p. 905] and on May 24, 1966 [R. T. p. 907]. She had a tape recorder with her on May 17 [R. T. p. 19] which was recording sounds that were being emitted in her presence [R. T. p. 934]. When the tape was replayed on May 19, "it wasn't very audible." [R. T. p. 935]. The tape recorder was also recording on May 23. [R. T. p. 947]. The recorder did not work on May 24 because it had not been turned on [R. T. p. 949]. The tape for May 23 was "not very audible." [R. T. p. 966]. Vicars, after listening to the tapes wrote a declaration [R. T. p. 967]. These were reduced to a full statement [R. T. p. 987]. The court held that the written statements weer not admissible to the jury [R. T. p. 992], but were entered as part of the record [R. T. p. 1892].

In *Hoffa v. United States,* (1966) 385 U.S. 293, 17 L. Ed. 2d 374, 382, this court held that no constitutional rights were violated where evidence was admitted of the testimony of a paid informer as to incriminating statements made by the defendant in his hotel suite, where the informer was in the suite by invitation and every conversation which he heard was either directed to him or knowingly carried on in his presence.

In *Katz* this court held that an electronic listening and recording device constituted an unreasonable search. *Katz* differs from the instant case in that Vicars testified to what was actually said in her presence by the appellant. Vicars' testimony was properly admitted in evidence. Such testimony was not the fruit of an illegal search. The testimony did not violate *Miranda, Katz* or *Alderman.*

III.

Appellant's Conviction Was Not a Denial of Due Process of Law.

A. Sufficiency of the Evidence.

A judgment will not be reversed for insufficiency of the evidence unless upon no reasonable hypothesis whatever is there sufficient evidence to support the trier of fact's conclusion. An appellate court will assume the existence of every fact in support of the judgment that can reasonably be deduced from the evidence.

People v. Bard, (1968) 70 A.C. 1, 3, 73 Cal. Rptr. 547.

Appellant's argument that the evidence is insufficient is not supported by a review of the record. The evidence is overwhelming that Laetrile is ineffective in

the treatment of cancer. Therefore, the evidence is sufficient that the appellant falsely represented a substance and treatment as effective to cure cancer and that the appellant disseminated a false advertisement of the drug Laetrile.

B. Rulings of the Trial Court.

The appellant alleges that the trial court committed error because of its failure to read the entire testimony of Tobias Flores to the jury.

The court informed counsel that the jury requested certain portions of Tobias Flores' testimony were to be read back to them [R. T. p. 3237]. The foreman of the jury told the court that the jury wanted testimony about "the first day that he visited Dr. Kowan" reread [R. T. p. 3234]. This testimony was read to the jury and the foreman indicated no more testimony was to be read [R. T. p. 3235].

In a criminal prosecution, where the jury returned after commencement of deliberations and requested the reading of certain contradictions in testimony of a prosecution witness, the court did not err in ordering read only those parts requested and not the entire testimony of the witness. A trial judge does not have to order read any part of testimony not requested by the jury foreman. (*People v. Gordon,* (1963) 222 Cal. App. 2d 687, 689, 35 Cal. Rptr. 335).

People v. Cathey, (1960) 186 Cal. App. 2d 217, 222, 8 Cal. Rptr. 694, relied on *People v. Smith,* (1906) 3 Cal. App. 62, 68, 84 Pac. 449, for the holding that "if the jury did not wish to hear it read, the court was not required to compel them to listen to it. It may be assumed that the portion of [the witnesses'] testi-

mony which they heard included all upon which they desired to have their memory refreshed."

The courts in *Smith* and *Cathey* held that the argument the appellant is now making was without merit. The appellant was not entitled to have Flores' complete testimony reread. That is not what the jury requested.

In his brief in the Appellate Department, the appellant made further reference to 65 pages of the reporter's transcript at which the trial court allegedly made erroneous rulings. With respect to these pages plus 57 references to pages in the transcript at which the prosecutor allegedly was guilty of misconduct, the appellant did not indicate the nature of the claimed error nor the manner in which it could have prejudiced the appellant in any substantial way.

The duty of counsel in preparing an appellate brief has been stated as follows:

> "The points made in a brief must be supported by argument or citation of authority or they will not be considered by the reviewing court, but will be deemed without foundation, without prejudice to the appellant's rights, or to have been waived or abandoned. The appellate court cannot be expected to prosecute an independent inquiry to find reasons for or against the rulings of the trial court, and it is the duty of counsel by argument and the citation of authority to show why rulings complained of are erroneous. It is not sufficient merely to state the error without showing of what it consists." (4 Cal. Jur. 2d Sec. 484, pp. 318-320).

An examination of the 3250 page reporter's transcript discloses that of the claimed errors appearing on the 122 pages generally enumerated by the appellant, the trial court sustained the appellant's objection on at least 30 occasions. With respect to the trial court's rulings that were adverse to the appellant, most of the trial court's rulings were correct, some questionable, and a few erroneous. Upon examination of all the evidence, the Appellate Department was of the opinion that the errors did not result in a miscarriage of justice. (California Constitution, Article VI, Section 13; *People v. Atchley,* (1959) 53 Cal. 2d 160, 177, 346 P. 2d 764; *People v. Watson,* (1956) 46 Cal. 2d 818, 836, 299 P. 243).

C. Conduct of the Prosecutor.

Whether a prosecutor was guilty of prejudicial misconduct must be determined in the light of the particular factual situation involved (*People v. Lyons,* (1958) 50 Cal. 2d 245, 262, 324 P. 2d 556; *People v. Butler;* (1967) 249 Cal. App. 2d 799, 808, 57 Cal. Rptr. 798).

In considering the alleged misconduct, it is important to review the jury instructions. The jury was instructed that it was to be "governed solely by the evidence introduced in the trial." The jury was not to consider any statement of counsel made during the trial. The jury was not to consider any evidence that was rejected (See: Instructions Given). It must be presumed that the jury meticulously followed the instructions of the court (*People v. McNear,* (1961) 190 Cal. App. 2d 541, 547, 12 Cal. Rptr. 124).

When a jury is promptly and adequately admonished, it must be assumed that the jury heeded the

admonition (*People v. Seiterle,* (1963) 59 Cal. 2d 703, 711; *People v. Ney,* (1965) 238 Cal. App. 2d 785, 801, 48 Cal. Rptr. 265). The jury was properly admonished on numerous occasions [R. T. p. 275, p. 1612, p. 1691, p. 1692, p. 1886, p. 1908, p. 2174, p 2239, p. 2316, p. 2662, p. 2993].

It should also be remembered in reviewing the alleged misconduct of the prosecutor, a defendant must not only object but he must also ask admonition of the jury. If not, he cannot complain of its absence (*People v. Campbell,* (1965) 232 Cal. App. 2d 712, 715, 43 Cal. Rptr. 71). Though the appellant objected to some of the comments of the prosecutor, many times he failed to ask for admonition of the jury. Appellee contends that the conduct of the prosecutor did not constitute prejudicial error (*People v. Wells,* (1968) 261 A.C.A. 537, 552-553, 68 Cal. Rptr. 400; *People v. Crawford,* (1967) 253 Cal. App. 2d 524, 61 Cal. Rptr. 472; *People v. Hernandez,* (1968) 263 A.C.A. 233, 245, 69 Cal. Rptr. 464).

The Appellate Department, after an examination of the 3250 reporter's transcript, determined that it does not appear that any of the claimed errors of the court or any of the claimed instances of misconduct of the prosecutor pertained to any violations of federal constitutional rights, and hence the doctrine of *Chapman v. California,* (1967) 386 U.S. 18, 17 L. Ed. 2d 705, was inapplicable. Even applying the *Chapman* test, the court declared "*that the claimed errors were harmless beyond a reasonable doubt.*"

Conclusion.

The appeal does not disclose that there has been a violation of appellant's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with the applicable decisions of this Court, or decided a federal question of substance not theretofore determined by this Court.

Appellees urges, therefore, that the appellant presents no substantial question for the decision of this Court; that the judgment sought to be appealed from should be affirmed or the appeal dismissed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

PHILIP E. GREY,
Assistant City Attorney,

MICHAEL T. SAUER,
Deputy City Attorney,

Attorneys for Appellee.